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Governmental Illegitimacy Revisited: "Pro-Democratic" Armed Intervention in the Post-Bipolar World

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Governmental Illegitimacy Revisted: 'Pro-Democratic' Armed Intervention in the Post-Bipolar World

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I. INTRODUCTION

International law has traditionally regarded the peoples of the world as being represented in the international arena by the governments in de facto control of their respective states. Except where such governments are imposed by foreign invasion or conduct themselves in ways inimical to international peace and security, these governments are conventionally deemed worthy of respect and protection under international law–in particular, respect regarding "matters which are essentially within the domestic jurisdiction"[1] and protection "from the threat or use of force."[2] The method by which a government of domestic origin achieves or retains power has not ordinarily been thought of as a basis for withholding such protection.

Hans Kelsen described the principle as follows:

> [U]nder what circumstances does a national legal order begin to be valid? The answer given by international law is that a national legal order begins to be valid as soon as it has become–on the whole–efficacious, and it ceases to be valid as soon as it loses this efficacy . . . . The Government brought into power by a revolution or coup d'état is, according to international law, the legitimate government of the state, whose identity is not affected by these events.[3]

As Chief Justice Taft ruled in the Tinoco Arbitration, the domestic constitutionality of the seizure of power is considered beyond the scope of international concern:

> The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government within its own jurisdiction?[4]

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1. U.N. CHARTER art. 2, ¶ 7.

2. *Id.* art. 2, ¶ 4.

3. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 220-21 (Anders Wedberg trans., 1961).

4. Tinoco Concession Case, (Gr. Brit. v. Costa Rica) 1 R.I.A.A. 369, 381-82 (1923), *reprinted in* 18 AM. J. INT'L L. 147 (1924).

Traditional doctrine thus privileges neither unilateral nor multilateral armed efforts to unseat a foreign government deemed, under some set of normative criteria, to be lacking in internal legitimacy.

The traditional view, however, appears likely to face new challenges arising from the strengthening of international human rights norms and the seemingly unprecedented spirit of international cooperation that have accompanied the end of bipolar geostrategic and ideological confrontation. On the one hand, liberal-democratic political values have increased immensely in prestige in the wake of the collapse of the Communist Party states of Eastern Europe;[5] on the other hand, dictatorships that, for political or geostrategic reasons, were once able to count on an automatic constituency on one or the other side of the bipolar divide suddenly find themselves vulnerable to broad international disapprobation. Thus, whereas coups d'état and rigged elections were not long ago considered business-as-usual, today they are candidates for a concerted international response, not implausibly extending as far as internationally sanctioned armed intervention. The determined reaction of the United Nations and the Organization of American States (OAS) to the September 1991 overthrow of popularly-elected Haitian President Jean-Bertrand Aristide, and the attendant discussion within the OAS about the possible use of force to restore the "legitimate" government, attest to the shift in attitude.

The contemporary version of what I shall term the "illegitimacy thesis"–the view that force can properly be used to unseat governments purportedly lacking in internal legitimacy–surfaced in the 1980s as an argument in support of U.S. intervention in Grenada, Nicaragua, and Panama. Although rejected by the international community when invoked on behalf of those essentially unilateral actions–which were widely perceived as having been taken for partisan advantage–the thesis itself presents an intellectual challenge that is not completely without resonance in the history of the U.N. system. Supporters of the thesis can find a measure of support in at least three areas of U.N. practice: controversies over governmental credentials, resolutions on self-determination issues, and the establishment of an international

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5. Carl Gershman of the National Endowment for Democracy has highlighted the point in a typically tendentious fashion:

> It has to be remembered that until recently there was a strong feeling that there was an alternative out there to Western liberal democracy. There was a belief in a higher form of democracy, one that emphasized results, equality, that could really achieve things.

Richard Bernstein, *New Issues Born from Communism's Death Knell*, N.Y. TIMES, Aug. 31, 1991, at 1, 11.

human right to political participation.

To be sure, any international effort to pass judgment on a government's internal legitimacy is fraught with difficulties. Yet, as the Haitian case attests, some movement in this direction seems to be the inevitable outgrowth of recent developments. The problem is to derive from established doctrine guiding principles that will provide an appropriately limited basis for broad multilateral action.

II. UNILATERAL ASSERTION OF THE ILLEGITIMACY THESIS: U.S. POLICY IN GRENADA, NICARAGUA, AND PANAMA

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations.
>
> U.N. CHARTER, art. 2, ¶ 4

The bipolar superpower confrontation generated two principal doctrinal challenges to the bar against the use of force. The first, the so-called "Brezhnev Doctrine," arose as a proposed justification of the 1968 Soviet Bloc invasion of Czechoslovakia. This doctrine stressed the irreversibility of the "gains of socialism" and the subordination of national sovereignty to the common interests of the community of nations.[6] As the governments espousing this theory no longer exist, one can safely say that the Brezhnev Doctrine, always overwhelmingly repudiated by the international community, has been consigned to the ash heap of history.

The same cannot so clearly be said of the second doctrinal challenge, the "Reagan Doctrine." The end of bipolarity has only enhanced the position of the United States as a world power and the prestige of Reagan policies among U.S. policymakers. If anything, the succeeding administration extended and generalized the doctrine, particularly the aspect of it that expresses the illegitimacy thesis. The legal debate initiated by the Reagan Administration thus remains a vital controversy in the post-bipolar world.

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6. The "Brezhnev Doctrine" was rationalized in the following manner:

> Just as . . . a man living in a society cannot be free from the society, one or another socialist state, staying in a system of other states composing the socialist community, cannot be free from the common interests of that community. The sovereignty of each socialist country cannot be opposed to the interests of the world of socialism, of the world revolutionary movement.

Pravda Article Justifying Intervention in Czechoslovakia, 7 I.L.M. 1323 (1968).

The Reagan Doctrine did not, on its face, claim the right to use force against every government deemed to be illegitimate. The essence of the doctrine was purported to be counterintervention. As explained by Jeane Kirkpatrick and Allan Gerson, the doctrine sanctioned the supply of arms and logistical support to existing insurgencies combating governments that both lacked the consent of the governed *and* depended on external supplies of armaments to maintain themselves in power.[7] Even thus limited, the doctrine appears directly at odds with settled international law. Indeed, the United States never sought to defend this principle in its submissions to the World Court in *Nicaragua v. United States*.[8]

In practice, the doctrine extended beyond the limitations suggested by Kirkpatrick and Gerson. The overlap between governments the Soviet Bloc supplied and governments the Reagan Administration despised was almost total, and to characterize the Administration's support of insurgents in Nicaragua and Angola as a "counter" to (wholly lawful) Soviet Bloc military assistance at best begs the "chicken-and-egg" question. It is also far from straightforward that the insurgencies supported were pre-existing, especially given the significance of the U.S. role in shaping the Nicaraguan insurgency. Moreover, although Kirkpatrick and Gerson defined the doctrine to exclude the direct use of military force, the Grenada invasion, though predating the supposed articulation of the doctrine, is widely understood as an exemplar.[9]

At the heart of the Reagan Doctrine, and the foundation of its political appeal, was its articulation of the illegitimacy thesis. Kirkpatrick and Gerson were unambiguous on this point:

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7. Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law, in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 19, 20 (Council on Foreign Relations ed., 2d ed. 1991) [hereinafter RIGHT V. MIGHT].

8. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua v. United States]. Indeed, assertion of this principle in that forum would have "boomeranged"; Nicaragua would have been able to assert it to justify the alleged aid to Salvadoran insurgents, which allegation underlay the U.S. claim of collective self-defense.

9. *See* Louis Henkin, *Use of Force: Law and U.S. Policy, in* RIGHT V. MIGHT, *supra* note 7, at 54 n.29.

> Mirroring basic American constitutional principles, the Reagan Doctrine rests on the claim that *legitimate* government depends on the consent of the governed and on its respect for the rights of citizens. A government is not legitimate merely because it exists, nor merely because it has independent rulers. Nazi Germany had a de facto government headed by Germans; that did not make it legitimate.[10]

W. Michael Reisman developed and extended this view in defending the Bush Administration's invasion of Panama, arguing that the traditional notion of state sovereignty is an anachronism:

> When [the people's] confirmed wishes are ignored by a local caudillo who either takes power himself or assigns it to a subordinate he controls, a jurist rooted in the late twentieth century can hardly say that an invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty . . . . [If cross-border military actions] displace the usurper and emplace the people who were freely elected, they can be characterized, in this particular regard, as a violation of sovereignty only if one uses the term anachronistically to mean the violation of some mystical survival of a monarchical right that supposedly devolves *jure gentium* on whichever warlord seizes and holds the presidential palace or if the term is used in the jurisprudentially bizarre sense to mean that inanimate territory has political rights that preempt those of its inhabitants.[11]

The "illegitimacy thesis" advanced by these supporters of the Reagan and Bush policies poses the following challenge to the conventional interpretation of Article 2(4): the use of force to unseat an illegitimate government violates neither the state's territorial integrity (assuming there is no intent to annex all or part of the country) nor its political independence (assuming there is no intent to colonize), since it merely liberates the body politic from domination by thugs whose control has been maintained, in the original version of this thesis, through an unpopular alliance with a foreign military power.[12] Rather than violating the purposes of the United Nations,

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10. Kirkpatrick & Gerson, *supra* note 7, at 23.

11. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 871 (1990).

12. *See* Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 520 (1990); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 644-45 (1984); *but see* Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L.

such armed intervention, in Reisman's rendition, serves the organization's higher purposes, the ban on the use of force being a mere means to "the enhancement of the ongoing right of peoples to determine their own political destinies."[13]

To be sure, the Reagan and Bush Administrations, notwithstanding their political rhetoric and the exuberant theorizing of their sympathizers in the legal community, did not rely on such sweeping propositions in presenting legal defenses for their actions. The illegitimacy thesis was asserted as a subsidiary, never a primary, justification for these actions, and even so it was generally embedded within less openly provocative contentions. The thesis nonetheless constituted a significant component of Reagan/Bush legal argumentation; it was not, to use Clarence Thomas' now-famous term, mere "amateur political theory."

A. Grenada

The Reagan Administration, along with the Organization of Eastern Caribbean States (OECS), in part justified the joint invasion of Grenada in October 1983 on the ground that the island nation's British-appointed Governor-General, Sir Paul Scoon, had invited intervention to restore law and order. The Administration pointed out that "the invitation of lawful governmental authority constitutes a recognized basis under international law for foreign states to provide requested assistance," and argued that Scoon was the "sole source of governmental legitimacy on the island."[14]

This contention is consistent with traditional doctrine only to the extent that it is manifestly inconsistent with the facts. At the time the invasion was launched, governmental authority in Grenada was being exercised by the Revolutionary Military Council (RMC), which had overcome successfully (albeit bloodily) all resistance and possessed full control of the armed forces. The RMC had announced

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645, 649 (1984) (characterizing this interpretation as "Orwellian" and pointing out that "the argument has not found any significant support").

13. Reisman, *supra* note 12, at 643; *see also* Kirkpatrick & Gerson, *supra* note 7, at 25-26 (arguing that the "whole purpose" of the Charter was to promote a world of democratic, human-rights-respecting, and peace-loving states); *but see* Schachter, *supra* note 12, at 648 (pointing out the "fundamental" nature of the rule against unilateral recourse to force).

14. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law,* 78 AM. J. INT'L L. 200, 203 (1984) (statement of Kenneth W. Dam, Deputy Secretary of State, before the House Committee on Foreign Affairs); *see also* Address of Tom Adams *in Documents on the Invasion of Grenada,* CARIBBEAN MONTHLY BULL., Oct. 1983, at 35, 38 (the Prime Minister of Barbados articulating the same position on behalf of the OECS).

its assumption of provisional executive and legislative power, had successfully maintained order for the previous five days through imposition of a curfew, and had engaged in negotiations with U.S. officials regarding the security of U.S. nationals.[15] The Governor-General, meanwhile, appears to have been placed under house arrest; whatever dubious argument can be made for his de jure authority,[16] he was unquestionably without de facto authority. By any test of effective control, the RMC was the legitimate government of Grenada.

This would not, of course, be the first time an invading power predicated its legal justification on patently untrue factual premises. But in light of the political statements preceding the legal justifications, that dismissive explanation is implausible. In President Reagan's words, military action was necessary

> to assist in the restoration of conditions of law and order and of governmental institutions to the island of Grenada, where a brutal group of leftist thugs violently seized power, killing the Prime Minister, three cabinet members, two labor leaders and other civilians including children.[17]

There was no question that the RMC had "seized power"; its power, however, did not in Reagan's view constitute legitimate authority because the seizure was a criminal act of thuggery. The RMC had failed a *normative*, not a positive, test of legitimacy.

B. Nicaragua

The illegitimacy thesis similarly appears in connection with the Reagan Administration's indirect intervention in Nicaragua. Although the sole justification offered before the World Court was collective self-defense, it is possible that this argument was taken even less seriously by the policy's supporters than by its opponents. The political justifications for the policy consistently emphasized the

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15. SCOTT DAVIDSON, GRENADA: A STUDY IN POLITICS AND THE LIMITS OF INTERNATIONAL LAW 98 (1987).

16. Under the 1979 People's Laws, which superseded the 1973 constitution, the Governor-General could "perform such functions as the People's Revolutionary Government may from time to time advise." *Id.* at 95. That government had been overthrown and effectively replaced by the RMC, which did not suspend the 1979 constitution. In the absence of a power vacuum, which did not in fact exist, or of "advice" by the (defunct) PRG or the RMC to elicit intervention, which clearly did not occur, the Governor-General had no de jure authority to invite the United States or the OECS to intervene. *Id.* at 92-101.

17. Text of United States President Ronald Reagan's Announcement of the Invasion of Grenada, *in Documents on the Invasion of Grenada, supra* note 14, at 17.

internal character of the Nicaragua regime, to such an extent that the Court felt compelled to address arguments beyond the pleadings. As the Court pointed out, a July 29, 1985, finding of the U.S. Congress based support for the Contras on alleged Sandinista breaches of "solemn commitments to the Nicaraguan people, the United States, and the Organization of American States" regarding democracy and human rights.[18] Although "advanced solely in a political context" and "not advanced as legal arguments," these contentions prompted the Court to make specific admonitions against any principle of "ideological intervention" and any unilateral right of states to use force to compel compliance even with legally binding "commitments" regarding internal policy.[19]

Kirkpatrick and Gerson applied the illegitimacy thesis straightforwardly to the Nicaragua case, never even mentioning collective self-defense. In justifying the Contra policy as an application of the Reagan Doctrine, they stated:

> Nicaragua today [1987] has a de facto government headed by Nicaraguans who were not elected in any competitive sense, who came to power by armed force, with help, on the basis of their promise to establish democracy. It is a government that requires massive foreign military support to maintain its power and to stop the advance of an indigenous armed resistance.[20]

Particularly interesting, for several reasons, is the contention that the Nicaraguan Government was "not elected in any competitive sense." First, the demand for competitive elections is much more specific than the vague notion of "consent of the governed," and has sweeping implications as an index of legitimacy, given the number of governments that facially fail this test. Second, the contention takes on a special meaning if one considers (as Kirkpatrick and Gerson mysteriously fail to mention) that six ideologically diverse opposition parties competed in the 1984 Nicaraguan elections, holding rallies, participating in radio and television debates, taking

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18. Nicaragua v. United States, *supra* note 8, at 130, ¶ 257.

19. *Id.* at 134-35, ¶¶ 266-68. Judge Schwebel's dissent adopted the Congressional finding's most legally significant assertion, charging that the Nicaraguan Government, prior to its installation in 1979, "gave undertakings to the OAS and its Members to govern in accordance with specified democratic standards and policies[,]. . . has failed so to govern, and has so failed deliberately and wilfully, as a matter of State policy." *Id.* at 382, ¶ 243. Although Judge Schwebel thus disagreed with the Court's determination that the pledge to the OAS did not rise to the level of a legal undertaking, *id.* at 132, ¶ 261, he strongly endorsed the Court's holdings that neither the United States nor the OAS was privileged to use force to compel compliance with such undertakings. *Id.* at 132-33, ¶ 262; at 385, ¶ 249.

20. Kirkpatrick & Gerson, *supra* note 7, at 23.

out ads in newspapers and on billboards, and winning over a third of the seats in the legislature.[21] Assuming that Kirkpatrick and Gerson do not intend the crassest of distortions, they apparently understand being "elected in a competitive sense" as entailing a very sophisticated (though unelaborated) set of requisites, thus making the test even more stringent than it appears on its face. Third, and relatedly, the selective disparagement of the 1984 Nicaraguan electoral process (compared, say, with that in El Salvador and other countries that have enjoyed Ambassador Kirkpatrick's sympathies) suggests that the test is not only stringent, but also highly susceptible to controversy and too manipulable to be entrusted to an interested party's unilateral judgment.

C. Panama

The murkiness of the Nicaraguan case contrasts with the clarity of the Panamanian situation. The widespread agreement among observers, not only as to the fraudulent character of the 1989 Panamanian elections but also as to the landslide victory of the opposition Presidential candidate, cast the legitimacy of the Noriega regime into immediate crisis. Given the verified popular mandate for a specific alternative government, the Bush Administration was not bashful about making the restoration of democracy one of the articulated objectives of the December 1989 invasion.[22] Thus, the United States flatly took the position before the OAS that

> a great principle is spreading across the world like wildfire. That principle, as we all know, is the revolutionary idea that the people, not governments, are sovereign. This principle has, in this decade, and especially in this historic year–1989–acquired the force of historical necessity . . . . Democracy today is synonymous with legitimacy the world over; it is, in short, the universal value of our time.[23]

Whereas the Reagan Doctrine purportedly emphasized counterintervention and support for indigenous insurgencies, the Bush Administration, although proffering at least three alternative justifications,[24] appeared to adopt the illegitimacy thesis in its purest

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21. *See, e.g.*, LATIN AMERICAN STUDIES ASSOCIATION, THE ELECTORAL PROCESS IN NICARAGUA (1984).

22. *See* David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq, and the New World Order*, *in* RIGHT V. MIGHT, *supra* note 7, at 118-19.

23. BUREAU OF PUB. AFF., U.S. DEP'T OF STATE, CURRENT POL'Y NO. 1240, PANAMA: A JUST CAUSE 2 (1990) (statement of Luigi R. Einaudi, U.S. Permanent Representative to the OAS).

24. The Administration alleged that it sought to protect American lives, to preserve the

form.

One commentator supportive of the U.S. actions in Grenada and Panama on illegitimacy thesis grounds has characterized the invasions as "customary-law-generating . . . milestones along the path to a new nonstatist conception of international law that changes previous nonintervention formulas . . . ."[25] This is a gross overstatement. The international community overwhelmingly condemned both actions.[26] The Grenada and Panama invasions were no more "customary-law-generating" than the Soviet Bloc invasions of Hungary and Czechoslovakia. Moreover, even Judge Schwebel's dissenting opinion in *Nicaragua v. United States* expressly repudiated any unilateral right to intervene forcibly in another state's internal affairs, even to compel compliance with established international legal obligations: "a State may use force only in response to the lawful injunctions of the United Nations and of regional organizations acting in conformity with the Purposes and Principles of the United Nations, and in individual or collective self-defense."[27]

Although U.S. invocation of the illegitimacy thesis to support unilateral uses of force does not itself signify a change in international law, customary or otherwise, the development of international sensibilities should not be overlooked. While the international community formally repudiated such invocation of the illegitimacy thesis, it not only failed to impose sanctions against the United States, but continued to look to the United States for international leadership (especially in the Persian Gulf crisis), notwithstanding what might have been characterized as America's irresponsible attitude toward the use of force and its outright contempt for U.N. and World Court censure of its policies. Moreover, the Grenada and Panama actions resulted in the formation of governments that the international community subsequently

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integrity of the Panama Canal treaties, and to apprehend a dangerous criminal. The insubstantiality of these grounds has been widely noted. *See* Scheffer, *supra* note 22, at 118-23.

25. D'Amato, *supra* note 12, at 517; *but see* Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law,* 84 AM. J. INT'L L. 494, 503 n.48 (1990) ("The logic of D'Amato's argument would allow George Bush in 1992 to contend that burglarizing Democratic National Headquarters has become an acceptable practice since Richard Nixon authorized such action in 1972.")

26. The U.N. General Assembly voted 108 to 9 (with 27 abstentions) to condemn the invasion of Grenada and 75 to 20 to condemn the invasion of Panama. DAVIDSON, *supra* note 15, at 146; Scheffer, *supra* note 22, at 123. The Organization of American States (OAS) condemned the invasion of Panama by a vote of 20 to 1 (only the United States dissenting).

27. Nicaragua v. United States, *supra* note 8, at 385, ¶ 249.

recognized. There is no indication that the fates of the Austin-Coard (RMC) and Noriega regimes were generally viewed as anything other than a good riddance.

It is the unilateralism of the Grenada and Panama actions that guaranteed their broad rejection by the international community. No respected or respectable theory of international law permits a single state, or a narrow alliance of states (such as the OECS or the Warsaw Pact), to use force against adversary regimes by unilaterally determining them to be illegitimate. It is no accident that U.S. and OECS hostility toward Grenada predated the Austin-Coard putsch, nor that Noriega's record of despotism predated any U.S. hostility toward his regime, nor that the Reagan and Bush Administrations found no difficulty in allying with other Caribbean basin regimes at least as thug-like and dictatorial as those against which these Administrations acted. Self-interested (let alone imperialistic) motivations are seldom stated as public justifications of foreign policy. As Oscar Schachter has put it, "To make an exception [to Article 2(4)] for 'higher' values–whether self-rule or justice–would so dilute the interdiction against force that it could have no application except in the unlikely case of an announced aggression."[28] Leaving open the illegitimacy thesis as a basis for unilateral intervention can only undermine the fragile norms on which world peace depends.

It does not follow, however, that the illegitimacy thesis is a dead letter. The international community has not always unquestioningly accepted regime legitimacy on the basis of the "effective control" criterion. International practice contains precedents for questioning a regime's methods of seizing and holding power. In this era of unprecedented international cooperation and in light of the strong international reaction to the Haitian situation, these precedents will inevitably be examined anew to determine whether they may provide the basis for broad multilateral action, perhaps including the use of force, against regimes that can clearly be identified as usurpers. The result may well be some movement, albeit cautious, in the direction of "a new nonstatist conception of international law that changes previous nonintervention formulas."[29]

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28. Oscar Schachter, *Is There a Right to Overthrow an Illegitimate Regime?, in LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPEMENT:* MELANGES MICHEL VIRALLY 423, 427 (A. Pedone 1991).

29. Anthony D'Amato compared anti-intervention norms to the "neutral" approach that nineteenth-century courts took toward wife-beating, which "served to insulate the physically stronger marriage partner against any compensatory force that could be provided by the police." D'Amato, *supra* note 12, at 517. Present-day jurists, D'Amato notes, see such categories as "home," "domestic," and "marriage" not as areas beyond the scope of jurisdiction, but as areas subject to jurisdiction. *Id.*

III. ASSERTIONS OF GOVERNMENTAL ILLEGITIMACY IN THE UNITED NATIONS CREDENTIAL PROCESS

The United Nations accords governments diplomatic recognition through a process of credentialing diplomatic representatives. On its face, denial of diplomatic recognition is far removed from the use of force. It may be noted, for instance, that the United States has behaved peacefully toward several governments to which it has denied diplomatic recognition, while using force against a Nicaraguan government with which it maintained diplomatic ties. The history of U.N. credentials controversies is nonetheless instructive as to the international community's views regarding regime legitimacy. More importantly, international recognition of governments may play a decisive role in determining whether the holder of some putative authority–such as Grenadian Governor-General Scoon, Panamanian President-elect Guillermo Endara, or Haitian President Aristide–may lawfully invite a foreign state, regional organization, or the United Nations to intervene with force.

In 1950, the General Assembly passed Resolution 396, stating that:

Ved P. Nanda, rebutting D'Amato's defense of the Panama invasion, summarily dismisses the domestic violence analogy:

> Unlike spouses who, as citizens of a state, receive benefits from, submit to and are expected to abide by universally agreed-to principles of law and morality derived through a democratically elected legislative process and enforced by an objective justice system and police force, nations such as Panama and the United States (and the USSR and Afghanistan) coexist within an international framework in which legal and moral principles are agreed to on the basis of mutual respect .... In situations where no consensus obtains, these *equal* participants are under constraints to comply with principles of international law such as nonintervention.

Nanda, *supra* note 25, at 498 n.24.

Yet, in thus forcefully reasserting the primacy of the state sovereignty principle, Nanda largely begs the question. The United States, presumably Nanda's paradigmatic example of a "state" (notwithstanding the bizarre references to "universally agreed-to principles" and "objective" courts and police), began as a republic of white male property-holders; the relationships of these "citizens" with their wives, slaves, employees, customers, etc., were mostly unregulated and often immune from regulation, as befitted the "mutual respect" that the "equal" white male property-holders owed one another. And certainly an individual state's treatment of racial minorities or criminal defendants was not a proper subject of federal intervention. Whether the international system is capable of an evolution analogous to that of the U.S. domestic system is problematic, but the issue cannot be resolved simply by restating it.

> whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case . . . .[30]

Two competing drafts of the applicable standard for international recognition were proposed to be included in the resolution. The first embodied a totally objective test, effective control being the sole criterion:

> [A] government . . . should be recognized if that government exercises effective control and authority over all or nearly all the national territory, and has the obedience of the bulk of the population of that territory in such a way that this control, authority, and obedience appear to be of a permanent character . . . .[31]

The United States, among other states, rejected the objective test, in particular because of its implication that continued U.N. representation of China by the Nationalist regime isolated on Taiwan could not be sustained.[32] A second draft, essentially embodying the U.S. position, read as follows:

> [T]he following should be among the factors to be taken into consideration in determining any such question:
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> (i) The extent to which the new authority exercises effective control over the territory of the Member State concerned and is *generally accepted* by the population;
>
> (ii) The willingness of that authority to accept responsibility for the carrying out by the Member State of its *obligations under the Charter*;
>
> (iii) The extent to which that authority has been established through internal processes in the Member State.[33]

It would appear that "generally accepted" was understood in

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30. G.A. Res. 396, U.N. GAOR, 5th Sess., Supp. No. 20, ¶ 1, U.N. Doc. A/1775 (1950).

31. U.N. GAOR, 5th Sess., Annexes, Agenda Item 61, at 6, U.N. Doc. A/AC.38/L.21 (1950).

32. *See* Note, *The United Nations, 28th Session: Cambodia Representation*, 15 HARV. INT'L L.J. 495, 505-07 (1974).

33. U.N. GAOR, 5th Sess., Annexes, Agenda Item 61, at 9, U.N. Doc. A/AC.38/L.45 (1950) (emphasis added).

terms of acquiescence rather than approval, and that the Charter "obligations" referred to peace and security rather than to human rights obligations under Articles 55 and 56. The proposal might thus be referred to as a modified objective test. Had the language been adopted, however, it would have left open an argument for normative appraisals of legitimacy. As it was, neither proposal was ultimately adopted, thus leaving no firm guidelines for resolving credential contests.[34]

The history of the United Nations has known eight significant credentials contests involving China, Hungary, Congo (Leopoldville), Yemen, Cambodia (1973-74 and post-1978), South Africa, and Israel. The *de facto* regime was denied credentials in the cases of China (1950-71), Hungary (1957-63), Cambodia (post-1978) and South Africa (1974), and narrowly prevailed in the case of Cambodia in 1973-74.[35]

Factor (ii) of the 1950 proposed modified objective test has been a basis for scrutiny of challenged regimes' international behavior. The United States successfully opposed the transfer of China's seat from the Nationalist to the Communist government for two decades on the ground that the latter failed to meet the criteria of Charter Article 4(1), which reserves U.N. membership to "peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."[36] This anomalous result, attributable to Cold War power politics, was overturned in 1971.[37] A 1982 challenge to Israeli Government credentials on these grounds, citing violations of U.N. resolutions, was beaten back by the United States and its allies.[38]

Factor (iii) of the 1950 proposal–establishment of authority through internal processes–was responsible for the refusal to take action on the Hungarian delegation's credentials for seven years following that government's 1956 installation by Soviet Bloc troops. The retention of the Cambodian seat by the "Democratic Kampuchea" government, despite the passing of effective control of most of the country to the "People's Republic of Kampuchea" government installed by the 1978 Vietnamese invasion, may also be attributed to factor (iii).[39] Unavailing were efforts by supporters of People's Kampuchea to spur consideration of the tyrannical nature

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34. *See* Note, *supra* note 32, at 506-07.

35. SEN. COMM. ON FOREIGN REL., CREDENTIALS CONSIDERATIONS IN THE UNITED NATIONS GENERAL ASSEMBLY: THE PROCESS AND ITS ROLE, S. PRT. NO. 143, 98th Cong., 1st Sess. (1983) [hereinafter CREDENTIALS CONSIDERATIONS].

36. *Id.* at 8.

37. G.A. Res. 2758, U.N. GAOR, 26th Sess., Supp. No. 29, at 2, U.N.Doc. A/8429 (1971).

38. CREDENTIALS CONSIDERATIONS, *supra* note 35, at 18-19.

39. *Id.* at 9, 15-16.

of the Democratic Kampuchea regime and the extent of internal support for the People's Republic.[40] Nonetheless, in the case of the Yemeni coup of 1962, the bolstering presence of foreign troops and the continued resistance of royalist forces did not prevent acceptance of the "republican" government, which was judged to possess effective control and which experts viewed as being essentially indigenous in nature.[41]

Internal circumstances were the bases of the challenges to the Kasa-Vubu Government in Congo (Leopoldville) in 1960, to the "Khmer Republic" in Cambodia in 1973-74, and to South Africa in 1974. In the Congolese situation, supporters of ex-Prime Minister Patrice Lumumba, who was dismissed by President Joseph Kasa-Vubu, argued that the replacement government's credentials should be rejected on grounds of Kasa-Vubu's non-compliance with the Congolese Constitution.[42] The Credentials Committee refused to consider the issue, ruling that to do so would be "an intervention in the domestic affairs of the Republic of the Congo . . . ."[43] The new government's credentials, having been properly signed by the head of state (Kasa-Vubu), were accepted on this mechanical basis.[44] This decision had special significance because U.N. forces had intervened, at the request of the former Kasa-Vubu/Lumumba government, to restore order in the wake of an army mutiny and a provincial separatist rebellion. These forces ultimately were used to suppress armed Lumumba partisans who denied the legitimacy of the new government.

The Cambodian controversy of 1973-74 required a decision between two competing "governments" that each claimed effective control. Prince Norodom Sihanouk, overthrown in a March 1970 coup led by General Lon Nol, had immediately established a government-in-exile and an alliance with communist Khmer Rouge guerrillas offering armed resistance to the new government.[45] Lon Nol's U.N. delegation nonetheless had been seated initially without challenge.[46] By 1973, however, facts on the ground had set the stage for competing claims. The opposition, while conceding the regime's control of the capital and other major cities, claimed to govern ninety

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40. *See* U.N. GAOR, Credentials Comm., 34th Sess., Annexes, Agenda Item 3, at 1-3, U.N. Doc. A/34/500 (1979).

41. CREDENTIALS CONSIDERATIONS, *supra* note 35, at 10.

42. U.N. GAOR, Credentials Comm., 15th Sess., Annexes, Agenda Item 3, ¶ 10, U.N. Doc. A/4578 (1960).

43. *Id.* ¶ 8.

44. *Id.*

45. Note, *supra* note 32, at 496-97.

46. CREDENTIAL CONSIDERATIONS, *supra* note 35, at 11.

percent of the territory and eighty percent of the population.[47] The Lon Nol Government sharply contradicted this claim, but did concede rebel control of four provinces.[48] Each cited its adversary's dependence on the assistance of foreign troops as a basis for its claim.[49]

More novelly, Sihanouk's supporters in the General Assembly argued that the coup had been "carried out at the instigation of the United States by people in its pay,"[50] and that credentialing the Lon Nol government was tantamount to sanctioning foreign intervention in Cambodia's internal affairs.[51] They further argued, without citing any particular evidence, that the Sihanouk government genuinely represented the will of the Cambodian people.[52] For its part, the Lon Nol Government charged that Sihanouk was guilty of high treason by virtue of his calls for rebellion and for assistance by Vietnamese Communist forces,[53] and that he lacked actual authority over the guerrilla force holding territory within Cambodia.[54] Lon Nol's General Assembly supporters further argued that General Assembly consideration of Sihanouk's claims amounted to improper outside interference in Cambodia's internal affairs.[55]

After deferral of the question for a year, the General Assembly resolved, by a two-vote margin, to maintain the status quo while urging a negotiated solution to the conflict. The resolution observed that, although the Sihanouk government had established authority over a portion of the country, the Lon Nol Government "still has control over a preponderant number of Cambodian people."[56]

Only in the South African case were credentials denied on the basis of the internal character of the regime. Through its de jure violations of one of the U.N. Charter's few unambiguous and broadly supported norms–racial equality–the South African Government

47. U.N. GAOR, 28th Sess., 2188th plen. mtg. ¶¶ 11, 17, U.N. Doc. A/PV.2188 (1973).

48. *Id.* ¶ 85.

49. *Id.* ¶¶ 11, 85.

50. *Id.* ¶ 5.

51. *See* U.N. GAOR, 28th Sess., 2191st plen. mtg. at 1, U.N. Doc. A/PV.2191 (1973).

52. U.N. GAOR Credentials Comm., 28th Sess., Annexes, Agenda Item 3, addendum pt. 1, ¶¶ 4, 5, U.N. Doc. A9179/Add. 1 (1973); U.N. GAOR, Credentials Comm., 29th Sess., Annexes, Agenda Item 3, addendum pt. 1, ¶ 8, U.N. Doc. A/9779/Add.1 (1974).

53. U.N. Doc. A/PV.2188, *supra* note 47, ¶ 81.

54. *See* U.N. GAOR, 28th Sess., 2155th plen. mtg. ¶ 32, U.N. Doc. A/PV.2155 (1973).

55. Letter Dated 24 October 1973 from Permanent Representatives of Indonesia, Japan, Malaysia, New Zealand, Philippines, Singapore, and Thailand to the United Nations Addressed to the Secretary-General, U.N. Doc. A/9254 (1973).

56. G.A. Res. 3238, U.N. GAOR, 29th Sess., Supp. No. 31, at 5, U.N. Doc. A/9631 (1974).

subjected itself to ever-increasing scrutiny and disapproval from the General Assembly, embodied in innumerable resolutions, including refusals to take action on credentials. These measures culminated in the events of 1973-74.

On December 14, 1973, the General Assembly passed a resolution declaring

> that the South African regime has no right to represent the people of South Africa and that the liberation movements recognized by the Organization of African Unity are the authentic representatives of the overwhelming majority of the South African people.[57]

The resolution went on to request

> all specialized agencies and other intergovernmental organizations to deny membership or privileges of membership to the South African regime and to invite, in consultation with the Organization of African Unity, representatives of the liberation movements of the South African people recognized by that organization to participate in their meetings . . . .[58]

Citing this resolution, a majority of the Credentials Committee began in earnest to challenge South African General Assembly representation the following year.[59] Although no competing slate of representatives was presented, members concluded that the Government, being a product of racial criteria, represented only a small fraction of South Africa's population and so could not legitimately select a delegation to represent the state.[60] Those challenging the Government's credentials discussed at length the pattern of systematic de jure electoral discrimination in South Africa,[61] apparently unperturbed by the incongruity of this scrutiny with the Organization's blithe acceptance of non-racial regimes that equally exclude from participation the vast majority of their citizenry. The United States was left, vainly, to point out that a credentials decision on the basis of domestic policies would constitute a dangerous precedent.[62] The Committee's rejection of the

57. G.A. Res. 3151(G), U.N. GAOR, 28th Sess., Supp. No. 30, ¶11, U.N. Doc. A/9030 (1973).

58. Id. ¶ 13.

59. U.N. GAOR Credentials Comm., 29th Sess., Annexes, Agenda Item 3, at 3, U.N. Doc. A/9779 (1974).

60. *Id.*

61. *Id.*

62. *Id.* ¶ 9.

South African delegation's credentials was overwhelmingly sustained by the General Assembly,[63] which, after some controversy as to the legality of its taking action tantamount to suspension of U.N. membership, excluded the South African delegation from participation in the Assembly.[64]

Although an exceptional case, the denial of the South African delegation's credentials and the General Assembly's outright rejection of that regime's legitimacy to represent the people of South Africa demonstrate that the U.N. concept of legitimacy cannot be totally dissociated from the concept of popular sovereignty. It is, as the U.S. representative protested, a dangerous precedent. This precedent is both topically and conceptually related to a larger area of U.N. practice surrounding self-determination and colonialism, an area in which the "effective control" test has given way more systematically.

IV. "SELF-DETERMINATION OF PEOPLES" AND THE ILLEGITIMACY THESIS

Article 1(2) of the U.N. Charter refers to "the principle of equal rights and self-determination of peoples" as the basis of "friendly relations among nations," development of which is one of the enumerated "Purposes" of the United Nations. The concept of self-determination is at odds with the "value-neutral" approach inherent in other areas of international law, for on its face it challenges effective control as the sole determinant of governmental legitimacy. As applied in U.N. practice, the doctrine of self-determination has meant an increasingly hard line against colonialism and its vestiges, and an emphasis on expressions of popular will regarding the political status of non-self-governing territories. Within this limited context, it has pegged regime legitimacy to consent of the governed.

In Resolution 1514, the General Assembly proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" and called for "[i]mmediate steps [to] be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories . . . in

63. G.A. Res. 3206, U.N. GAOR, 29th Sess., Supp. No. 31, at 2, U.N. Doc. A/9631 (1974); U.N. GAOR, 29th Sess., plen. mtg. ¶ 175, U.N. Doc. A/PV.2248 (1974) (adopted 98 to 23, with 14 abstentions).

64. *See* Note, *The General Assembly, 29th Session: The Decredentialization of South Africa*, 16 HARV. INT'L L.J. 576 (1975); CREDENTIALS CONSIDERATIONS, *supra* note 35, at 12-15.

accordance with their freely expressed will and desire . . . ."[65] Resolution 1541 then elaborated that with respect to "a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it, . . . administrative, political, juridical, economic or historical" elements may be considered to determine whether "they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination. . . ."[66] Principle VI of this resolution defined the realization of self-determination as follows:

> A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
>
> (a) Emergence as a sovereign independent State;
>
> (b) Free association with an independent State; or
>
> (c) Integration with an independent State.[67]

Resolution 1541 further specified under what circumstances the alternatives to full independence may legitimately be realized, being most specific with respect to integration (Principle IX(b)):

> The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems necessary, supervise these processes.[68]

This solicitude for process seems, in actuality, to establish a presumption in favor of independence in the colonial context rather than a commitment to participatory principles as such. The World Court, reviewing the relevant resolutions in its *Western Sahara* opinion, implied that plebiscites are an instrumentality rather than the essence of self-determination:

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65. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66-67, U.N. Doc. A/4684 (1960).

66. G.A. Res. 1541 (annex), U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

67. *Id.*

68. *Id.* at 30, Principle IX(b).

> The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. These instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.[69]

Judge Ammoun, in his separate opinion, argued for making the point more explicit by adding to the foregoing paragraph the words "and in particular the legitimate struggle for liberation from foreign domination."[70] In the style of vanguardist revolutionary leaderships, Judge Ammoun asserted, "Nothing could show more clearly the will for emancipation than the struggle undertaken in common, with the risks and immense sacrifices it entails. That struggle is more decisive than a referendum, being absolutely sincere and authentic."[71] This implies a special version of the effective control doctrine for insurgencies: liberation movements represent dependent peoples by virtue of their ability to mobilize resistance, and thereby to establish themselves (by whatever means) as the alternative source of authority. As the right to self-determination belongs to "the people"–in the singular, and therefore abstract, sense of that word–the right does not automatically imply meaningful participation by the individuals who make up that entity.

Whether infused with participatory values or not, the self-determination doctrine raises important challenges to the effective control doctrine. The United Nations on this basis denied recognition to Southern Rhodesia, a state of colonial settlers which had declared independence from Great Britain in order to perpetuate the disenfranchisement of the indigenous population, despite the regime's unquestionable control over the territory and population. Not only did the Security Council call on states to refuse recognition of the regime,[72] it called on the British to "put an end" to the situation, deeming it "a threat to international peace and Security."[73]

On the other hand, the General Assembly recognized the Republic of Guinea-Bissau under the leadership of the Partido Africano da Independencia da Guine e Cabo Verde (PAIGC),

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69. Western Sahara, 1975 I.C.J. 12, 33 (Oct. 16).

70. *Id.* at 100.

71. *Id.*

72. S.C. Res. 216, U.N. SCOR, 20th Sess., 1258th mtg. at 8, U.N. Doc. S/Res/216 (1965).

73. S.C. Res. 217, U.N. SCOR, 20th Sess., 1265th mtg. at 8, U.N. Doc. S/Res/217 (1965).

notwithstanding continuing Portuguese control of the capital and other major urban centers.[74] At the very least, the presumption in favor of the established regime that won the day on similar facts in the 1973-74 Cambodian credentials controversy is reversed where the principle of self-determination plays a role. This is all the more remarkable given that recognition of independence during a continuing state of revolutionary war has the additional consequence of branding the colonialist resistance as external aggression, leaving open the possibility of U.N. or unilateral foreign intervention against the "invaders."[75]

Yet the self-determination doctrine has realized even broader consequences. Having proclaimed that "colonial peoples have the inherent right to struggle by all necessary means . . . against colonial Powers,"[76] the General Assembly announced "its full support for the armed struggle of the Namibian people under the leadership of the South West Africa People's Organization"[77] (SWAPO) prior to any plebiscite or to even the formation of a provisional government that could be recognized. Even more remarkably, the General Assembly in 1981 called on

> Member States, specialized agencies and other international organizations to render increased and sustained support and material, financial, *military* and other assistance to the South West Africa People's Organization to enable it to intensify its struggle for the liberation of Namibia.[78]

Thus, the self-determination doctrine trumps Article 2(4), or rather defines a circumstance in which territorial integrity, political independence, and the purposes of the United Nations are furthered rather than impaired by the use of force.

Kirkpatrick and Gerson referred to such resolutions as making "it open season on any government that can be described as 'alien, colonialist or racist.'"[79] They added (without any supporting authority) that "[i]n principle, any non-Soviet regime can be so

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74. Note, *United Nations, 28th Session: Recognition of Guinea (Bissau)*, 15 HARV. INT'L L.J. 482, 491 (1974).

75. *See id.* at 489.

76. G.A. Res. 3103, U.N. GAOR 6th Comm., 28th Sess., Supp. No. 48, at 142, U.N. Doc. A/9030 (1973).

77. G.A. Res. 34/92 (G), U.N. GAOR, 34th Sess., Supp. No. 46, at 27, U.N. Doc. A/34/46 (1980).

78. G.A. Res. 35/227 (A), U.N. GAOR, 35th Sess., Supp. No. 48, at 42, U.N. Doc. A/35/48 (1981) (emphasis added).

79. Kirkpatrick & Gerson, *supra* note 7, at 30.

described," and thus argued that the United States cannot then fairly be precluded from aiding "groups fighting for democratic self-determination" against Soviet-backed regimes.[80] Yet Kirkpatrick and Gerson were precisely wrong about the expanse of this doctrine. As one commentator observed:

> There seems to be a general understanding that once the door is opened to applying the principle to minorities or "backward peoples" within their territories, practically no state would be able to escape the disapprobation of the international community. As a result, there has been a tacit understanding that *no really serious effort will be made to expand the scope of the principle beyond its application to colonial peoples.* This "conspiracy" against dependent groups within national territories was in effect even before the advent of the Afro-Asian states into the international community, but once in, they have embraced it with great tenacity.[81]

The doctrine remains limited, notwithstanding many recent successful secessions.[82] Still less has the doctrine extended to mainstream citizens of ordinary dictatorships (whether pro- or anti-Soviet), where "self-government" is as effectively denied the overwhelming majority of the population as in colonial territories.

Nonetheless, a tradition of thought asserting the essence of self-determination to be popular participation in government has always contributed to the doctrine. This tradition, which has been referred to as the "plebiscite theory" of self-determination, is concerned not with mere national equality, but with the right of citizens collectively to decide the issues that affect their lives.[83] To the extent that this tradition continues to provide much of the moral force behind the self-determination doctrine, it might well, in this era of breathtaking changes, be asked why the principle of self-determination should not be extended to all citizens living in countries where the established

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80. *Id.* at 30, 33.

81. W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 145-46 (1977) (footnotes omitted) (emphasis added).

82. *See, e.g.*, G.A. Res. 47/82, U.N. GAOR 3d Comm., 47th Sess., U.N. Doc. A/47/659 (1992) (reiterating support for the self-determination principle while referring only to the traditional anti-colonial and Palestinian causes, with most of the newly independent states of Eastern Europe and the former USSR abstaining). The seemingly premature recognition of the independence of states comprising the former Yugoslavia contradicts prior practice, but no general principle favoring self-determination within established states seems likely to emerge (as can be seen with respect to the Croatian and Bosnian Serbs).

83. OFUATEY-KODJOE, *supra* note 81, at 31, 43.

human right of political participation is verifiably and flagrantly violated.

V. THE ILLEGITIMACY THESIS AND THE HUMAN RIGHT TO POLITICAL PARTICIPATION

Article 55(c) of the U.N. Charter commits the Organization to the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Under Article 56, "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." Although falling far short of authorizing the use of force, whether unilateral or multilateral, to compel compliance with human rights standards, these provisions do make clear that the pursuit of human rights does not, as such, constitute intervention "in matters which are essentially within the domestic jurisdiction" under Article 2(7).

Among the human rights deemed fit objects of international concern is the right of political participation. This right was embodied in Article 21 of the Universal Declaration of Human Rights as follows:

> 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> 2. Everyone has the right to equal access to public service in his country.
>
> 3. *The will of the people shall be the basis of the authority of government*; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. [84]

The subsequent International Covenant on Civil and Political Rights contains a watered-down version of this provision:

> Every citizen shall have the right and the opportunity . . . without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

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84. *Universal Declaration of Human Rights*, G.A. Res. 217 (A), U.N. Doc. A/810, at 71 (1948) (emphasis added).

> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.[85]

The differences between the two articulations are interesting. It is not simply that, as Henry Steiner has noted, the "earlier instrument, influenced to a greater degree than the International Covenant by the tradition of liberal democracy, gives more emphasis to the role of the 'will of the people' as the 'basis of the authority of government.'"[86] The main ideological competitors of liberal democracy, adherents of one variant or another of Leninist vanguardism, did not, after all, deny the role of popular will as the basis of governmental authority; the often-used terms "people's democracy" and "socialist democracy" were affirmations of fidelity to this notion, the revolutionary struggle being the ultimate embodiment of the popular will.

The Declaration's version is more threatening to non-liberal approaches because it contains, at least arguably, an unwelcome nexus between elections and governmental authority. As Jorge Dominguez has summarized the Cuban Government's view, "[r]evolutionary rule is not legitimated by voting; rather, an election is legitimated by revolutionary rule."[87] Article 21 of the Declaration can be read syllogistically to mean that the basis of governmental authority is such popular will as has been expressed in the elections, whereas non-liberal regimes would prefer it to mean that the popular will is (in some abstract sense) the basis of–and therefore expressed by–governmental authority, and is also expressed in elections. The Covenant version simplifies the matter by leaving undefined the relationship, if any, not only between authority and elections, but also between authority and participation.[88]

Moreover, one can plausibly contend that Article 2(7) of the U.N. Charter requires that international human rights law disavow any

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85. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 55, art. 55, U.N. Doc. A/6316 (1967).

86. Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 87 (1988).

87. JORGE DOMINGUEZ, CUBA: ORDER AND REVOLUTION 298 (1978).

88. It should be recalled that the Covenant embodies a "legal" commitment, whereas the Declaration was understood as embodying merely a "political" commitment. If the legal commitment that states have made since 1966 falls short of the political commitment made in 1948, it is difficult to argue that states should now be held legally accountable to the greater commitment.

connection between participation and the power to decide. U.N. resolutions have consistently implied that the "essence" of domestic jurisdiction includes "each States's sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states."[89] The international community may, under Articles 55 and 56, promote state observance of the right of citizens to participate in their governance, but has no clear authority to mandate a particular allocation of decision-making power within a sovereign state.

In any event, an election's "genuineness," as referred to by both participation provisions, has no obvious criteria. Even the more liberal-democratic Declaration does not require that governments be elected, as Kirkpatrick and Gerson demanded, "in a competitive sense." Arguably, genuineness is to be interpreted in accordance with the diverse ideological frameworks of the signatory states. A suggested amendment to Article 21 of the Declaration, explicitly calling for electoral competition among multiple political parties, was withdrawn when met by Soviet protests that it was "absolutely irreconcilable with the social structure of certain Member States" and "in contradiction with the electoral procedures" of the Soviet Union.[90] The electoral processes in one-party states (or in states like the former German Democratic Republic, which had multiple parties responsible for different constituencies but adhering to a single platform) allowed the citizenry either to select or to ratify the selection of the most "qualified" individuals to serve; they were not occasions to revisit the issues decisively resolved by the revolutionary struggle, nor to debate issues supposedly resolvable by deduction from that fateful historical decision.

The Communist Party states insisted that elections were only one aspect of participation, and that their citizens continually took part directly in decision-making through a variety of mechanisms, such as nationwide discussions of draft legislation and the quasi-governmental activities of mass organizations.[91] These states claimed their practices to be fully faithful to Article 25 of the Covenant, yet embedded in a non-liberal context. As East Germany revealingly submitted, "[t]he essence of socialist democracy consists in the moulding of society in conformity with the objective laws of

89. G.A. Res. 45/150, U.N. GAOR 3d Comm., 45th Sess., Supp. No. 49, ¶ 4 , U.N. Doc. A/45/49 (1990).

90. Steiner, *supra* note 86, at 91 (citing U.N. GAOR 3d. Comm., 3d Sess., 133d plen. mtg. at 11, U.N. Doc. A/C.3/SR.133 (1948); U.N. GAOR 3d. Comm., 3d Sess., 134th plen. mtg. at 6, U.N. Doc. A/C.3/SR.134 (1948)).

91. *See, e.g.*, the submissions of the GDR, Cuba and the USSR to the U.N. Human Rights Commission, U.N. Docs E/CN.4/1984/12/Add. 1 at 2, E/CN.4/1985/10/Add. 1 at 6 and at 14, respectively.

development, with guidance by the State and the enlightened and committed involvement of the majority of the people in that process."[92] "Enlightened and committed involvement" evidently meant involvement responsive to "guidance." It is not obvious that this interpretation of Article 25's requirements contradicted either the provision's letter or its "spirit," given what had been deliberately left out by the Covenant's ideologically diverse framers.

Nonetheless, it is a mistake to write off the Declaration and the Covenant as bases for a participatory norm of governmental legitimacy. Like the U.S. Constitution, the Declaration and the Covenant are living documents capable of evolution. What the Declaration and the Covenant could plausibly have been read to mean at their inceptions does not dictate what they can plausibly be read to mean today, or tomorrow. Recent years have seen dramatic, if uneven, progress toward multi-party electoral structures, not only in all of Eastern Europe, but throughout Latin America and in various nations of Asia (Pakistan, the Philippines, South Korea), Sub-Saharan Africa (Namibia, Zambia, haltingly in Nigeria) and even the Middle East (gradually in Jordan, abortively in Algeria). In Haiti and Myanmar (but not in Algeria or Nigeria), refusals to heed electoral results have incurred worldwide opprobrium. International efforts to end long-raging civil wars in Cambodia, Angola, and El Salvador have had, as significant components, mechanisms for fair and competitive elections, and the Governments of Colombia and Nicaragua have pursued electoral solutions to civil strife, the latter at the cost of its own demise. The most important ideological opponents of the equation of popular participation with multi-party elections have vanished from the scene, and those that remain have suffered a dramatic loss of prestige (e.g., China from its massacre of thousands of student demonstrators, Cuba from its isolation). In short, history has deprived certain arguments of much of their force.[93]

U.N. practice, far from lagging behind developments, is at the cutting edge. In December 1988, the General Assembly called on the U.N. Human Rights Commission "to consider appropriate ways and means of enhancing the effectiveness of the principle of periodic and genuine elections," albeit "in the context of full respect for the

92. U.N. Doc. E/CN.4/1984/12/Add. 1 at 2.

93. In recent separate articles, Thomas Frank and Gregory Fox argue that the events, regional agreements, and authoritative pronouncements of the past few years have fostered the emergence of a determinate and enforceable "right to denicratic governance." Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992). I shall not here attempt to assess the evidence they cite for this debatable proposition.

sovereignty of Member States . . . ."[94] The result adopted by the Economic and Social Council in May 1989 was a "framework for future efforts," the first heading of which was "The will of the people expressed through periodic and genuine elections as the basis for the authority of government," a phrase that clears up the above-mentioned ambiguity in Article 21 of the Declaration.[95] The document included mention of, inter alia, "the right of citizens of a State to change their governmental system through appropriate constitutional means," "the right of candidates to put forward their political views, individually and in co-operation with others," and the need for "independent supervision" of elections.[96]

In December 1990, the General Assembly, with only eight dissenting votes, declared "that determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others. . . ."[97] It nonetheless immediately added the words, "as provided in national constitutions and laws," and further recognized:

> that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections shall not call into question each State's sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states.[98]

The net result, albeit limited, is a strengthening of the participation norm.

More concretely, as a result of agreements among contending forces, the United Nations has become involved in election monitoring in Haiti, Namibia, Nicaragua, Angola, and Cambodia. The mandate accorded the observer mission in the Nicaraguan case included:

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94. G.A. Res. 43/157, U.N. GAOR 3d Comm., 43d Sess., Supp. No. 49, ¶ 5, U.N. Doc. A/43/49 (1988).

95. Report of the Economic and Social Council: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, U.N. GAOR, 44th Sess., Annex , Agenda Item 12, at 1, 2, U.N. Doc. A/44/454 (1989).

96. *Id.* at 2.

97. G.A. Res. 45/150, *supra* note 89, ¶ 3.

98. *Id.* ¶ 4. A second resolution, passed over the dissenting votes of twenty-nine nations (mostly Western democracies), reiterated in even stronger terms the norm of noninterference in national electoral processes. G.A. Res. 45/151, U.N. GAOR, 45th Sess., Supp. No. 49A, at 255 U.N. Doc. A/45/49 (1990).

> (a) To verify that political parties are equitably represented in the Supreme Electoral Council and its subsidiary bodies (nine regional electoral councils and 4,100 electoral boards).
>
> (b) To verify that political parties enjoy complete freedom of organization and mobilization, without hindrance or intimidation by anyone.
>
> (c) To verify that all political parties have equitable access to State television and radio in terms of both the timing and the length of broadcasts.
>
> (d) To verify that electoral rolls are properly drawn up.[99]

Thus, far from merely verifying the honesty of the vote count, the U.N. mission in Nicaragua undertook to oversee intricate details not only of the electoral mechanism but of the contextual conditions. Although the U.N. presence came at the request of a sovereign government, and could not have been imposed in ordinary circumstances even under a permissive reading of Article 2(7), activities of this nature cannot but identify the United Nations with evolving norms of electoral legitimacy.[100]

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99. *The Situation in Central America: Threats to International Peace and Security and Peace Initiative*, U.N. GAOR, 44th Sess., Annex I, Agenda Item 34, Appendix at 3 U.N. Doc. A/44/375 (1989).

100. Gregory Fox contends that the observer mission standards can be used to interpret the participation clauses of the international human rights instruments, since, "[a]ccording to [Article 31(1) of] the Vienna Convention on the Law of Treaties, evidence of the 'ordinary meaning' of treaty terms may be derived from sources not formally linked to a treaty." Fox, *supra* note 93, at 588. To the argument that U.N. election monitoring should not be used to interpret treaties because the monitoring occurs only at the invitation of member states, Fox responds that the monitors' requirements "consistently match the text" of the treaties and that "many echo holdings of the U.N. Human Rights Committee" and other interpretive bodies. *Id.* at 590. He further contends that "all member states have at some point participated in the formulation of such standards" as states have had the opportunity to voice objections before the General Assembly and Security Council. *Id.*

Fox's argument has some force, but contains a troubling circularity: the mission standards should be used to interpret human rights law because the standards are an application of human rights law, and the evidence of their being an application of human rights law is that they match some interpretation of human rights law. In reality, not only did the observer teams not purport to enforce human rights law, but they operated on the basis of state party consent that appears to have been rooted, not in a sense of legal obligation, but in purely political considerations.

Moreover, it is particularly dubious to argue that the failure of most member states to object to the observer mission standards constitutes acceptance of those standards as an interpretation of human rights law. Since the standards have applied only to the

The reaction to the September 29, 1991 Haitian coup evidences that the norm of popular participation has come into its own as an international index of governmental legitimacy, at least where the international community has already become enmeshed (through the "observer" function) in domestic processes. Taking the lead was the Organization of American States, which four months earlier had resolved to respond to "any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process" in any member state.[101] The OAS immediately condemned the coup as "disregard for the legitimate government of Haiti, which was constituted by the will of its people freely expressed in a free and democratic electoral process," and recognized the Aristide Government's representatives "as the only legitimate representatives of the Government of Haiti to the organs, agencies, and entities of the inter-American system," adding that "no government that may result from this illegal situation will be accepted."[102] The OAS resolved to recommend diplomatic isolation and suspension of economic ties, and "to adopt any additional measure that may be necessary and appropriate to ensure the immediate reinstatement of President Jean-Bertrand Aristide to the exercise of his legitimate authority."[103]

The OAS position was promptly endorsed by a variety of regional organizations[104] and by a stunning array of speakers before the U.N. Security Council. The United States, the Soviet Union, Cuba, Honduras, Cote D'Ivoire, India, France, Belgium, Austria, Yemen, Romania and even Zaire took to the floor to affirm the sole legitimacy of the democratically-elected government.[105] *No one spoke up for the effective control test.* The resulting General Assembly resolution, adopted without a vote on October 11, 1991, not only condemned "the attempted illegal replacement of the constitutional President of Haiti," but declared "unacceptable any entity resulting from that

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states being monitored, and those states have consented to the monitoring, other states would have no occasion to intercede. Indeed, dissenting states would likely understand such intercession as presumptuous interference in the affairs of the consenting sovereign state.

101. Representative Democracy, OEA/Ser. P/AG/RES. 1080 (XXI-0/91), ¶ 1 (June 5, 1991). The extent of measures authorized by this "Santiago Commitment" is difficult to ascertain.

102. U.N. Docs. S/23109, S/23132 (1991).

103. *Id.*

104. *See, e.g.*, U.N. Doc. S/23219 (1991) (African, Caribbean and Pacific Group resolution demanding "the total and immediate restoration of the constitutionally elected government" and recognizing Aristide's delegates as "the sole legitimate representatives of the Haitian Government" to the Group's institutions).

105. U.N. Doc. (Press Release) SC/5314 (1991).

illegal situation."[106]

A new era, it seems, has dawned. However much one might question its determinacy and its standing vis-a-vis other international law norms, the right to political participation can no longer be ignored as a factor in assessing governmental legitimacy.

VI. CONCLUSION: A MODEST PROPOSAL

Despite the traditional strength of the effective control test, recent developments have demonstrated the viability of the illegitimacy thesis in the context of broad multilateral consensus. Although in the past the thesis has prevailed only with respect to "alien, colonial or racist" regimes, being based on a doctrine of self-determination rooted in the values of racial and national equality rather than in the right of popular participation in government, participatory norms have now developed to the point where one can begin to speak cautiously about extending the illegitimacy thesis as a basis for the use of force.

Thus far, the Aristide Government has not issued an invitation to the OAS or the United Nations to intervene forcibly in Haiti, nor has it organized an insurgency that might appeal to governments for arms and logistical support. Its most dramatic accomplishment as a government-in-exile has been to prompt the Security Council to recognize certain consequences of the crisis as "threats to international peace and security," thereby justifying an imposition of economic sanctions–an extraordinary level of U.N. intervention in a domestic power struggle.[107] At this writing, a test case involving use of force is not upon us, and may well be averted. Still, one can conclude from the tenor of the proclamations that, in all likelihood, fulfillment of requests for armed assistance would not in this case be deemed a violation of international law. Assuming this is true, where does it leave the state of the law?

It is dangerous to generalize from the easy case. The Aristide Government had won an overwhelming victory (sixty-seven percent of the vote) in internationally monitored elections just nine months prior to a coup by a military notorious for its history of human rights abuses, corruption, and disrespect for democratic processes. Journalistic accounts of conditions within Haiti confirm the President's continuing popularity. As the elected leadership remains physically intact, there is no contest over the mandate to articulate the will of the "legitimate" government. Although the coup

106. G.A. Res. 46/7, U.N. GAOR, 46th Sess., Supp. No. 49, U.N. Doc. A/46/49 (1991).

107. S.C. Res. 841, U.N. SCOR , 48th Sess., 3238th mtg. at 2, U.N. Doc. S/Res 841 (1993) (ordering a ban on oil and arms shipments to Haiti and a freeze on Haitian assets).

leadership has support in the elected legislature and cites human rights abuses allegedly encouraged by Aristide, its violent conduct and unsavory history belie any claim to be acting on behalf of democracy and human rights. Such a set of facts is not likely often to be replicated.

Still, the demise of effective control as the sole criterion of legitimacy suggests that a new set of criteria is in order. One set of U.N. credentials criteria inconclusively offered in 1950 referred to the "extent to which the new authority . . . is accepted by the population."[108] Although "acceptance" was, in the 1950 international law lexicon, synonymous with acquiescence, reflecting the prevalent doctrine of that day, acceptance today might mean something different. The question should not be whether the bulk of the populace is beyond the regime's control nor whether the citizenry exhibits (through electoral mechanisms or otherwise) affirmative support for the leadership, but whether the majority of the population regards the government as legitimately exercising governance, rather than engaging in thuggish usurpation.

The idea is not to impose alien values and processes on sovereign nations, but at the same time not to accept assertions of sovereignty simply because a ruler has the brute strength to assert it. The statements by such countries as Zaire and Cuba in affirming the legitimacy of a non-de facto government suggest that they are prepared to live by the results of such a test. And their lack of pluralistic electoral processes should not automatically cause them to fail it, lest the imperative of political participation become a device for the deprivation of political independence and self-determination. "Consent of the governed" takes a variety of forms.[109]

There are, of course, disparities in the ease of fact-finding. Where regimes undertake to hold multi-party elections, that undertaking–as a matter of logic rather than morality–constitutes a concession that the honestly-determined winner of the elections is legitimately entitled to hold office, at least until some intervening event casts the popular mandate into question.[110] The evidence of

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108. U.N. Doc. A/AC.38/L.6 (1950). *See supra* note 33 and accompanying text.

109. It should be recalled that the great seventeenth-century theorist of "consent of the governed," John Locke, denied that the principle prescribed any particular form of government. Majority support (however manifested) could as readily validate monarchy as democracy, provided that the regime satisfied the purposes for which the people consented to live under government. *See* John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* (Ch. X, ¶¶ 132-33), *in* TWO TREATISES OF GOVERNMENT 265, 354-55 (Peter Laslett ed., 1992).

110. Serious questions are likely to arise when controversial events occur between the election and the overthrow of the elected government. An elected government might, for example, violate the constitution, commit human rights abuses, betray the platform

illegitimacy of a coup in such circumstances is nearly irrefutable.

This logic, it will be objected, disproportionately disadvantages dictatorial authorities who hold elections and then negate their results, like the Haitian military, the leadership of Myanmar, and the Noriega regime, without penalizing authorities that refuse pluralistic elections altogether, such as the Chinese or the Saudis. Yet even a regime that on principle eschews such elections may engage in conduct that breaks the link to an established source of legitimacy, without forging any evident link to a new source. Where, as in Grenada in 1983, an observably popular, if not competitively elected, leader is deposed and then, along with large numbers of his supporters, mercilessly assassinated by a regime with no visible popular support or other credible basis for establishing rule, a good case can be made in the international community, barring ideological and geostrategic polarization, that, even in the absence of a usurped electoral mandate, recognition should be withheld and intervention of some sort considered.

In practice, most controversies as to governmental legitimacy are replete with complexity and ambiguity. Popular will, even if said to be the sole criterion, operates at more than one level; it may be articulated variously by the President, the Legislature, the Constitution, time-honored traditions, mass demonstrations and much else. A consensus judgment of usurpation will, of necessity, be the exceptional case, as it should be if one takes seriously the notions of self-determination and national equality. But recent experience demonstrates that clear cases do occur.

To the extent that a broad international consensus can be maintained, the option of multilateral use of force to remove an illegitimate regime, whatever the prudential considerations, should not be excluded as unlawful. Although the illegitimacy thesis presents overwhelming dangers in the hands of unilateral actors, to eschew it definitively in the context of broad multilateral consensus is to assert a concept of state sovereignty that has indeed become an anachronism.

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on which it was elected, decline precipitously in popularity, or take actions that risk provoking civil or international war.